judgment after the expiration of the judgment term and had granted a new trial upon the ground of alleged "irregularity, surprise, fraud and deceit in the procurement of said verdict and judgment". This Court said in part (p. 668, *et seq.*):

> "The legal proposition involved in the judgment complained of and necessary to maintain it is that the Supreme Court of this District at special term has the same discretionary power over its judgments, rendered at a previous term of the court, without any motion or other proceeding to that end made or taken at that term, to set them aside and grant new trials of the actions in which they were rendered, which it has over judgments when such proceedings are taken during the term at which they were rendered; and that this being true, the proceeding and order of the court, in the exercise of this jurisdiction and discretion, cannot be reviewed on appeal or writ of error (p. 679). We * * * are of opinion, and so decide, that, after the term at which they were rendered, the power of the court over the parties and over its record remains only in the excepted cases already noticed, when, on motion, it may be purged of clerical errors, or the judgment reversed by proceedings for errors in fact, in analogy to the practice in cases of writs of error *coram vobis*, unless it is invoked by a formal bill in equity upon grounds recognized as furnishing a title to relief."

In *United States* v. *Mayer*, 235 U. S. 55, a defendant, who after trial had been convicted in a criminal cause on five counts for violations of the mail fraud sections of the Federal Criminal Statutes, moved in the District Court to set aside the judgments of conviction and for a new trial upon newly discovered evidence. The motion was made

while his appeal from the judgments of conviction was pending in the Circuit Court of Appeals for the Second Circuit, but after the expiration of the term of the District Court at which said judgments were entered. The District Court on consent of the United States Attorney heard the application on the merits and held that the defendant had not had a fair trial because of bias which one of the jurors entertained against the defendant and which he had concealed on his examination on the *voir dire*. The Chief Justice, then Mr. Justice Hughes, writing for a unanimous court, in answering questions certified by the Circuit Court of Appeals on rule to show cause why prohibition should not issue, held that as the judgment term had expired the District Court was without jurisdiction to vacate the judgments of conviction and to grant a new trial, saying (p. 67):

> "In the absence of statute providing otherwise, the general principle obtains that a court cannot set aside or alter its final judgment after the expiration of the term at which it was entered, unless the proceeding for that purpose was begun during that term * * * ."

This Court pointed out that, although a certain correctional jurisdiction remains in the District Court after the expiration of the term, such jurisdiction is of limited scope and does not embrace the power to grant a new trial on newly discovered evidence, saying (p. 69):

> "This jurisdiction was of limited scope; the power of the Court thus to vacate its judgment for errors of fact existed, as already stated, in those cases where the errors were of the most fundamental character, that is, such as rendered the proceeding itself

irregular and invalid. *In cases of* prejudicial misconduct in the course of the trial, the misbehavior or partiality of jurors and *newly discovered evidence,* as well as where it is sought to have the court in which the case was tried reconsider its rulings, *the remedy is by a motion for a new trial* (Jud. Code, Sec. 269) —*an application which* is addressed to the sound discretion of the trial court, and, *in accordance with the established principles which have been repeatedly set forth in the decisions of this Court above cited, cannot be entertained, in the absence of a different statutory rule, after the expiration of the term at which the judgment was entered.*" (Italics ours.)

The foregoing salutary principles were again applied by this Court in the comparatively recent case of *Delaware, Lackawanna & Western R. R. Co.* v. *Rellstab,* 276 U. S. 1. There the District Court of New Jersey, after its judgment had been affirmed by the Circuit Court of Appeals, and after the expiration of the judgment term, vacated its own judgment and granted a new trial upon the ground of perjured testimony. Mr. Justice Holmes, writing for a unanimous court, in holding the District Court to be without jurisdiction to vacate its judgment said (p. 4):

"However strong may have been the convictions of the District Judge that injustice would be done by enforcing the judgment, he could not set it aside on the ground that the testimony of admitted perjurers was perjured also at the second trial. *The power of the Court to set aside its judgment on this ground ended with the term.*" (Italics ours.)

No claim is or could be made by petitioner that the case at bar comes within any of the exceptions referred to in *United States* v. *Mayer* whereby a

limited jurisdiction in the District Court obtains for the purpose of correcting inaccuracies in matters of form or clerical errors and in civil cases to rectify such mistakes of fact as were reviewable on writs of error *coram nobis* or *coram vobis*. Nor are we here concerned with the question whether the petitioner is entitled to relief by way of a bill of review in equity. The decision of the Circuit Court of Appeals herein that the District Court lacked power to set aside its own judgment and grant a new trial after the expiration of the judgment term, was in strict "accordance with established principles repeatedly set forth in the decisions of this Court" that "in cases of * * * newly discovered evidence * * * the remedy is by a motion for a new trial * * * an application which * * * cannot be entertained in the absence of a different statutory rule after the expiration of the term at which the judgment was entered" (*United States* v. *Mayer, supra*).

II.

The pendency in the Circuit Court of Appeals of petitioner's appeal from the judgment did not authorize the Circuit Court of Appeals to remand the case to permit the District Court to vacate its own judgment and grant petitioner's motion for a new trial after the expiration of the term of the District Court at which said judgment was entered.

Petitioner contends that because of the pendency of its appeal in the Circuit Court of Appeals, that court, without reversing or modifying the judgment, and indeed, in the face of its af-

firmance of the judgment, could properly remand the cause at the District Court's request so that the District Court could vacate its own judgment and grant a new trial upon newly discovered evidence although the judgment term had expired. Such contention, we submit, is unsound both on principle and authority. The Circuit Court of Appeals, like the District Court, is a court created by statute. It has no original jurisdiction, but only such jurisdiction as is conferred upon it which is exclusively appellate. (*Whitney* v. *Dick,* 202 U. S. 132; *United States* v. *Mayer,* 235 U. S. 55; *Frankel* v. *Woodrough,* 7 F(2) 796; Act of March 3, 1891, Secs. 2, 6, 26 Stat. L. 826, 828.) Being an appellate court exclusively, the jurisdiction of the Circuit Court of Appeals in respect of cases pending before it on appeal is restricted to the correction of errors committed in the proceedings before the Trial Court, and which are preserved for review by the record.

The Circuit Court of Appeals concededly may not grant a motion for a new trial on newly discovered evidence, and by its order of remand of June 28, 1930 did not purport to do so. Its sole authority is to affirm, reverse or modify the judgment appealed from. Finding no error in the record herein, the Circuit Court of Appeals had affirmed plaintiff's judgment in its *per curiam* opinion of January 15, 1930. As Circuit Judge Woolley appropriately observed below (R., p. 73) this case "is not the ordinary case of a new trial awarded after a judgment has been reversed. Here the judgment had been affirmed and with the affirmance still in force a new trial was ordered*."

*No proceedings were taken under the District Court's order pending the disposition of plaintiff's appeal therefrom.

The order of remand, therefore, was not an order or decree giving effect to a judgment of the Circuit Court of Appeals in the exercise of its exclusively appellate jurisdiction. On the contrary, it was an order entered at the request of the District Court—as the Circuit Court of Appeals itself expressed it: "To give the District Court a free hand"—and at most merely permitted the District Court to grant a new trial if it had jurisdiction to do so. As the judgment in plaintiff's favor had not been reversed or modified by mandate of the Circuit Court of Appeals, and as the order of the Circuit Court of Appeals dismissing the appeal "without prejudice" did not disturb the judgment in plaintiff's favor, it is clear that said order did not vest in the District Court jurisdiction to set aside its own judgment and grant a new trial after the expiration of the judgment term. The District Court being without jurisdiction to grant a new trial, the permissive order of remand manifestly could not confer jurisdiction upon the District Court and should not have been granted. The Circuit Court of Appeals was therefore clearly right in making the second order complained of, which granted plaintiff's motion and vacated said order of remand.

The decision below in this respect is not only sound on principle, but in strict conformity with the applicable decisions of this Court. Thus in *United States* v. *Mayer, supra,* this Court's decision that the District Court, after the judgment term, could not grant a new trial on newly discovered evidence *was made in respect of a criminal case in which an appeal was at that time pending in the Circuit Court of Appeals for the Second Circuit.* While leave had not there been obtained

from the Circuit Court of Appeals to apply to the District Court for a new trial, the holding that the District Court was without jurisdiction to entertain such an application was based, not upon any such technical consideration, but upon the fundamental consideration of lack of power of the District Court to alter its judgments after expiration of the term of the court at which they are rendered.

This Court's decision in *United States* v. *Mayer*, involved the liberty of a human being who had been sentenced to imprisonment as a result of what was held by the District Judge to have been an unfair trial, and if, in accordance with petitioner's contention, relief could have been afforded the defendant therein by the simple expedient of a permissive order from the Circuit Court of Appeals remanding the cause for that purpose, it is inconceivable that this Court would have held the District Court to be without jurisdiction. If such a permissive order of remand could revive jurisdiction in the District Court or confer upon it a new or special jurisdiction to grant a new trial on newly discovered evidence after the judgment term, this Court manifestly would have said so in its exhaustive opinion, inasmuch as the appeal was still pending in the Circuit Court of Appeals.*

In *Roemer* v. *Simon*, 91 U. S. 149, while the case was pending upon appeal before this Court, appel-

*One of the questions certified by the Circuit Court of Appeals and answered by this Court in the negative, reads as follows: "Question II. When a writ of error has been issued to review a judgment of conviction in a criminal cause entered in a District Court, has the District Court, upon a motion made after the term at which the judgment was entered, jurisdiction to set aside the judgment and order a new trial on facts discovered after the expiration of said term and not appearing in the record of the previous trial?"

lant, upon motion, requested this court to set aside the final decree of the Circuit Court and grant a rehearing on newly discovered evidence. This Court denied appellant's motion, holding that its sole power was to "affirm, reverse or modify the decree appealed from, and that upon the hearing of the cause." Mr. Chief Justice Waite, in writing for a unanimous court, set forth the proper practice for such a rehearing, *in cases where the term of the trial court has not expired,* but held that inasmuch as the term of the Circuit Court in that case had expired, the case could not be remanded by this Court for rehearing, saying:

> "It is clear that after an appeal in equity to this court we cannot, upon motion, set aside a decree of the court below and grant a rehearing. We can only affirm, reverse or modify the decree appealed from; and that upon the hearing of the cause. No new evidence can be received here. (Rev. St., Sec. 698). The court below cannot grant a rehearing after the term at which the final decree was rendered. Equity Rule 88. *It would be useless to remand this cause, therefore, as the term at which the decree was rendered has passed*". (Italics ours.)

The decisions of the Circuit Courts of Appeals are of similar import. In *Strand* v. *Griffith,* (C. C. A. 9) 135 F. 739, the Court denied appellant's motion for leave to dismiss the appeal and to remand the cause to the lower court "with directions to said court to allow requested amendments to the bill of complaint to be made," holding, on authority of *Roemer* v. *Simon, supra,* that it was without power to grant the relief requested, the term of the court below having expired.

In *Marden* v. *Campbell P. & Mfg. Co.*, (C. C. A. 1) 67 Fed. 809, the court said (p. 811):

> "The defendants in the court below have filed two motions in this court, which we have considered. The first is that the cause be remanded to the circuit court 'for the purpose of rehearing of the said cause,' having reference undoubtedly to the new matter presented to the circuit court, to which we have referred. *This court, however, has no power to remand except for the purpose of giving effect to some judgment of its own. Roemer* v. *Simon*, 91 U. S. 149; *Smith* v. *Weeks*, 3 C. C. A. 644; 53 Fed. 758. This is so essential by fundamental rules of practice that it need only be stated. *To remand under any other circumstances would necessarily operate as a dismissal.*" (Italics ours.)

As the decree there appealed from was interlocutory, appellants were permitted to dismiss the appeal without prejudice to further proceedings in the Circuit Court, which then clearly had jurisdiction of the cause.

In *Baltimore S. S. Co.* v. *Phillips*, 9 Fed. (2) 902, the Circuit Court of Appeals for the Second Circuit upheld the right of the District Court to vacate a prior judgment from which an appeal had been taken *where the term of the District Court had not expired* and the cause had been remanded by the Circuit Court of Appeals at the request of the District Court for its further consideration. Referring to this Court's decision in *Roemer* v. *Simon, supra*, the Circuit Court of Appeals said (p. 903):

> "The decree appealed from was final and the term had expired, for which reason the court denied the motion, as *the Circuit Court*

> *could have done nothing in the cause after remittitur.* But they laid down the proper practice, if the term had been open, which is for the appellant to apply to the lower court to reopen the decree, and for that court to request the upper court to remit.' (Italics ours.)

Petitioner cites no case wherein this Court, or any Circuit Court of Appeals, remanded a case pending before it on appeal to permit the lower court to grant a new trial on newly discovered evidence after the expiration of the judgment term. The cases of *Angle* v. *United States,* (C. C. A. 4), 162 Fed. 264 and *Martin* v. *United States,* (C. C. A. 5), 17 F(2d) 972, relied upon by petitioner as being in conflict with the decision reached herein, are cases in which applications for new trials were *denied,* while in *Scott* v. *United States,* (C. C. A. 5), 165 Fed. 172, the Circuit Court of Appeals, in authorizing the trial court to modify its sentence in a criminal cause, based its action upon the consent of the Government. Although the opinions indicate that the courts assumed such power to exist, the statements in regard thereto may be regarded as *dicta,* inasmuch as the question of jurisdiction does not appear to have been mooted and the applications were in fact denied. Whether or not the quotations relied upon by petitioner, may be regarded as more than *dicta,* they are clearly in conflict with the decisions of this Court hereinabove referred to, and thus afford no ground for contention that the decision of the Circuit Court of Appeals herein, which followed the applicable decisions of this Court, has created a conflict with decisions of other Circuit Courts of Appeals,

1930. The decision of the court was without prejudice to petitioner's right to seek relief by bill of review in equity (R., p. 75).

Petitioner, while praying for a review of both orders of the Circuit Court of Appeals of July 6, 1931 (Petition, pp. 1, 7), in its brief questions solely the propriety of the Circuit Court of Appeals' order, vacating its own prior order of remand, and in its petition (p. 5) fails to assign as error the action of the Circuit Court of Appeals in making its order reversing the order of the District Court which purported to vacate plaintiff's judgment and grant a new trial after the expiration of the term.

It should be noted that the order of the Circuit Court of Appeals vacating its order of remand of June 28, 1930 was entered on plaintiff's motion seasonably made, which motion was continued by orders of the Circuit Court of Appeals to the March Term 1931, when it was heard along with the argument of plaintiff's appeal from the District Court's order vacating the judgment and granting a new trial. While plaintiff's petition and other papers on which the Circuit Court of Appeals made its order of July 6, 1931, vacating its order of remand, do not appear either in the transcript of record on plaintiff's appeal or in the record on the principal appeal printed as an Appendix thereto, the matters in connection therewith, we believe, are sufficiently set forth in the opinion of the Circuit Court of Appeals.*

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*Note: Docket entries appearing in the transcript of record on the prior appeal (Appendix R. 1-3) do not include docket entries in the cause since the case has been pending in the Circuit Court of Appeals. Pertinent docket entries in the prior appeal subsequent to June 21, 1930, the date of the last docket entry appearing in the transcript of record on the prior appeal, (Appendix) as furnished us by the Clerk of the Circuit Court of Appeals, are set forth infra in an appendix to this brief.

ARGUMENT.

I.

The decision of the Circuit Court of Appeals that the District Court of Delaware had no jurisdiction to vacate and set aside, on June 30, 1930, the judgment in plaintiff's favor entered May 11, 1929 during the March Term 1929 of said District Court, was clearly correct and in strict conformity with the applicable decisions of this Court.

It is a fundamental principle, thoroughly established by repeated decisions of this Court, that a court cannot set aside or alter its final judgment after the expiration of the term at which it was entered, unless a proceeding for that purpose was begun during the term, or the term was for that purpose extended under general or special rule. *Hudson* v. *Guestier*, 7 Cranch, 1; *Cameron* v. *M'Roberts*, 3 Wheat. 591; *Ex parte Sibbald*, 12 Pet. 488; *Bank of United States* v. *Moss*, 6 How. 31, 38; *Bronson* v. *Schulten*, 104 U. S. 410, 415-417; *Phillips* v. *Negley*, 117 U. S. 665, 673, 674; *Hickman* v. *Fort Scott*, 141 U. S. 415; *Hume* v. *Bowie*, 148 U. S. 245, 255; *Tubman* v. *B. & O. R. R. Co.*, 190 U. S. 38; *Wetmore* v. *Karrick*, 205 U. S. 141, 149-152; *In re Metropolitan Trust Co.*, 218 U. S. 312, 320, 321; *United States* v. *Mayer*, 235 U. S. 55; *D. L. & W. R. R. Co.* v. *Rellstab*, 276 U. S. 1.

In *Phillips* v. *Negley*, 117 U. S. 665, this Court reversed an order of the Supreme Court of the District of Columbia which had set aside a default

trial to a separable issue is in no wise involved herein. The Circuit Court of Appeals did not grant a new trial; it did not disturb the District Court's judgment. It had found no error and affirmed the judgment in a *per curiam* opinion and by its order of affirmance entered January 15, 1930. Furthermore, as shown by the court's opinion (R., p. 75) it has adhered to its views on the law of the case by denying, simultaneously with its decision herein, the petition for rehearing which had been filed by defendant and which had remained undecided when its order of remand was made. The case of *Gasoline Products Co.* v. *Champlin Refining Co.* is not apposite here, inasmuch as the question of the scope of a retrial is pertinent only where a new trial has been ordered by the appellate court for errors appearing in the record and, therefore, affords no basis for the issuance of a writ of certiorari herein.

CONCLUSION.

It is respectfully submitted that the petition should be denied.

September, 1931.

ROBERT H. RICHARDS,
AARON FINGER,
CARL EHLERMANN,
THOMAS J. CRAWFORD,
Attorneys for Respondent.

APPENDIX.

The docket entries in the Circuit Court of Appeals, on petitioner's appeal from the judgment in plaintiff's favor, subsequent to June 27, 1929, the date of the last docket entry appearing in the Appendix to the Transcript of record on this appeal, as furnished us by the Clerk of the Circuit Court of Appeals, include, among other entries, the following:

1930

Jan. 15—Opinion *per curiam* filed;
Order affirming decree filed;

Feb. 3—Petition for rehearing filed;

Mar. 5—Petition to remand case to District Court for taking further evidence filed;
Argued on petition to remand, *Coram:* Woolley, Davis and Johnson, JJ;

" 11—Memorandum in support of Motion to remand case filed;
Memorandum for appellee in opposition to petition to remand case filed;

" 26—Order staying proceedings pending petition to District Court filed;

June 26—Certified copy of request of District Court to remand case to their court filed;

" 28—Exceptions to order of March 26, 1930 filed;
Order dismissing appeal and remanding case to District Court filed;

Oct. 2—Petition for rule to show cause filed;
Order allowing petition to be filed and argument to be had at October Term filed.

1931

Jan. 10—Stipulation to continue case filed;

" 13—Order to continue case to March Term, 1931 filed;

Feb. 16—Transfer to printed calendar;

Mar. 31—Argued—*Coram:* Buffington, Woolley & Davis, JJ;
Notice of argument of motion filed;

Apr. 11—Brief in support of motion filed;

July 6—Order vacating order of June 28, 1930, dismissing appeal filed;
Order denying petition for rehearing filed;

" 23—Order staying mandate filed in No. 4506.